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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1486

CHEVRON CHEMICAL COMPANY,
a Delaware Corporation,
Petitioner,

vs.

HON. HORACE W. GILMORE,
United States District Court Judge
for the Eastern District of Michigan,
Respondent.

PLAINTIFF'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

ROBERT A. TYLER, P.C.
ROBERT A. TYLER (P 25404)
1675 Penobscot Building
Detroit, Michigan 48226
(313) 961-2575

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COUNTER-QUESTION PRESENTED

I.

SHOULD THE COURT ALLOW REVIEW OF A CASE WHICH HAS BEEN REMANDED PURSUANT TO 28 USC §1447(c) BY PRESENTMENT OF A "SHAM" ARGUMENT IN ATTEMPT TO AVOID 28 USC §1447(d)?

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STATEMENT OF THE CASE

This is a product liability action filed on behalf of Marie E. Munn and George A. Munn on February 13, 1981 in Wayne County Circuit Court. At the time it was filed it was alleged that products manufactured by defendant, Chevron Chemical Company, caused abnormalities in plaintiff, George A. Munn, including terminal carcinoma, from which Mr. Munn died on March 27, 1981. The case was removed to the United States Federal District Court, for the Eastern District of Michigan, by defendant, Chevron.

On July 21, 1982 the deposition of Chevron's employee, Dwight K. Maloney, was taken. At that deposition Mr. Maloney testified that the products in controversy contained a compound known as "Silvex", manufactured for Chevron by Dow Chemical Company. Dow Chemical Company is a corporation with its principal place of business in the State of Michigan. Mr. Maloney further testified that Silvex contained a substance known as Dioxin, a chemical known to be carcinogenic to human beings and animals.

Prior to this deposition plaintiffs had forwarded interrogatories to defendant, Chevron, on October 1, 1981. These interrogatories were finally answered by Chevron on April 19, 1982. These interrogatories requested information concerning suspected carcinogens in the subject products. Defendant, Chevron, replied that neither of the subject products, nor components thereof, were suspected of being carcinogenic. The applicable interrogatory is as follows:

> "Question 6: Please identify which, if any, of the above products have been suspected of having a carcinogenic effect upon living beings, animal or human, indicating the appropriate time frame when first suspected, names and addresses of individuals conducting said investigations or studies or tests that led to the suspicion, type of carcinoma suspected to be associated with said product.
>
> Answer to Question 6: Neither Weed-B-Gon neither Weed and Feed have been suspected of having a carcinogenic effect upon living beings."

Prior to the deposition testimony of Mr. Maloney plaintiffs were unaware that Dioxin was contained in defendant's products or that Dow Chemical Company was involved in the manufacture of defendant's products.

Based upon the new information, plaintiff filed a motion on or about September 21, 1982 for leave to amend their complaint for the purpose of adding Dow Chemical Company and to remand the lawsuit to the Wayne County Circuit Court, as

a result of the lack of diversity, if the amendment was granted.

The case was transferred from Judge Cohn to Judge Gilmore because of apparent stock ownership. On September 27, 1982, the Honorable Horace W. Gilmore of the United States District Court for the Eastern District of Michigan granted said motion. For the reason that Dow Chemical Company is a corporation with its principal place of business in the State of Michigan, Judge Gilmore remanded the lawsuit to Wayne County Circuit Court where it had been originally filed. The addition of Dow Chemical Company destroyed the diversity of citizenship upon which defendant, Chevron's removal petition was grounded. This lawsuit involves no federal questions.

REASONS WHY THE WRIT SHOULD NOT ISSUE

Since the case was lacking both the diversity of citizenship and federal questions necessary for exercise of subject matter jurisdiction in the Federal District Court, Judge Gilmore's Order of Remand was proper.

Mandamus is an extraordinary remedy utilized to compel the performance of a public official's ministerial duty where the movant has a clear and undisputable right to the issuance of such a writ. No new rights can be acquired through such a writ, the purpose of which is to enforce rights already vested. *Will* v *United States*, 389 U.S. 90 (1967). In order to grant a Writ of Mandamus the movant must establish a clear right to the relief requested, a plainly defined duty on the part of the public official to perform the act in question and the unavailability of other adequate relief. *Holmes* v *United States Board of Parole*, 541 F.2d 1343 (7th Cir. 1976). A Writ of Mandamus is to issue only in extraordinary circumstances amounting to a "judicial usurpation of power." *Kerr* v *United States District Court, Northern District, California*, 426 U.S. 394 (1976). Judge Gilmore's Order of remand was couched in the only terms provided for in 28 USC §1447(c). It is clear, however, that the Court had no choice but to remand the case to state court once

it allowed for the amendment adding a party destroying diversity jurisdiction. *Wallace* v *Knapp-Monarch Company*, 234 F.2d 853 98th Cir. 1956); *Highway Construction Co.* v *McClelland*, 15 F.2d 187 (8th Cir. 1926), cert. den. 273 US 765 (1927). Under settled Federal Law it is evident that the exercise of a sound discretion in the District Court may permit a new party to be added even though its citizenship destroys diversity and requires a remand. *Littlefield* v *Cas. Co.*, 475 F. Supp 887 (C.D. Calif. 1979); *Harper Financial Corp.* v *Hansom Oil Corp.*, 403 F. Supp. 1405 (W.D. Tenn. 1975); *Ingersoll* v *Pearl Assurance Co.*, 153 F. Supp. 558 (N.D. Calif. 1957). As the petitioner points out, the instances in which the amendment to add parties destroying diversity have typically been kept to a minimum. Generally, there are two justifications for the permission of such an amendment after removal. Petitioner has identified only one of those, that being the addition of an indispensable party which destroys diversity of citizenship. The other instance in which such an exercise of discretion is justified is where there are strong equities in favor of the proffered amendment. *Ingersoll* v *Pearl Assurance Co.*, 153 F. Supp. 558 (N.D. Calif. 1957); 1A Moore's Federal Practice §56.07 (2d ed. 1982). The Honorable Judge Gilmore's reference to the "strong equities" favoring amendment here, although criticized by the Petitioner as being unfounded, is indeed based upon the law and accepted practices of the Federal District Bench.

Since the Court's decision with respect to the amendment is discretionary, and since that discretion was properly exercised in this instance, there is no basis for the issuance of a Writ of Mandamus. It is clear that despite the knowledge of Chevron that they filed false answers to interrogatories with respect to the carcinogenic effects of the products. This is clearly evident by interrogatories which they have subsequently answered.

On November 11, 1982 plaintiff filed supplemental interrogatories to defendant, Chevron, third set. Chevron answered

these interrogatories on March 21, 1983. The pertinent interrogatory is as follows:

> "Question 33: When did the defendant first learn that the chemical "dioxin" was suspected of being carcinogenic to human beings or animals?
>
> Answer 33. The carcinogenic potential of "dioxin" (TCDD: 2,3,7,8-tetrachloro-dibenzo-p-dioxin) has recently been demonstrated in laboratory animal investigations. There appears to be some controversy as to the findings in some of the studies. Chevron Environmental Health Center was aware of the results of these investigations when they were completed in the late 1970's."

It, therefore, appears that the company who manufactured the cancer-producing ingredient of defendant Chevron's products was not a party to the lawsuit until after Judge Gilmore's order allowing the amendment of the complaint. It is within the Court's discretion when there are strong equities in favor of the amendment to allow such amendment. Based upon the intentional non-disclosure of the carcinogenic effect of the element of the product, in previous answers to interrogatories, and the fact that the company that manufactured the carcinogenic agent was not a defendant, the strong equities would point toward allowing the amendment. Once the amendment is allowed, diversity is destroyed and the case is properly remanded to the Wayne County Circuit Court.

The greatest injustice which could be done would be to grant the petitioner's petition in this case. What has occurred is that petitioner has intentionally filed false answers to interrogatories, five and a half months after they were due; accuse plaintiff of filing the motion to amend simply to avoid the timetables imposed by the Federal Court; wrongfully accused Judge Gilmore of entering a "sham" and "form" order simply to clear his docket when there is no basis to support same; all in an attempt to avoid the clear statement of 28 USC §1447(d). The factual basis as contained in *Thermtron Products, Inc.* v

Hermansdorfer, 420 US 923 (1975), is not applicable to the present situation.

The Court properly remanded the matter to the State Court under 28 USC 1447(c).

The Order of the United States Court of Appeals for the Sixth Circuit is clearly proper.

For all of the reasons stated above, plaintiff respectfully urges this Court to deny the Petition for Writ of Certiorari or in the Alternative for Writ of Mandamus, as sought by Chevron Chemical Company.

Respectfully submitted,

ROBERT A. TYLER, P.C.

BY: _____

ROBERT A. TYLER (P 25404)
Attorney for Plaintiff
1675 Penobscot Building
Detroit, Michigan 48226
(313) 961-2575